Supreme Court, U.S.
FILED

95 • 362 AUG 17 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

MICHAEL ROMBERG and DEBRA ROMBERG,

Petitioners,

v.

ROBERT NICHOLS, DENNIS LAZZARI, HUGH LLOYD, BENITO JURADO, and THOMAS LAING,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN YAGMAN
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200

Attorneys for Petitioners, Michael Romberg and Debra Romberg

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

HIP

QUESTION PRESENTED

Does this Court's decision in *Farrar v. Hobby*, 113 S.Ct. 566 (1992) (plurality), warrant an award of no attorneys' fees under 42 U.S.C. 1988 when a prevailing plaintiff in an action brought under 42 U.S.C. 1983 asks for only nominal damages and does not recover nominal damages because of any failure of proof, but because there were no actual damages in fact to be recovered?

TABLE OF CONTENTS

Page

Question Presented i

Opinions Below 1

Jurisdiction 2

Statutes and Rules Involved 2

Statement 2

Reasons for Granting the Petition 8-29

I. The Opinion of the court below will operate to discourage lawyers from taking civil rights cases that are meritorious but in which there is no prospect of damages 9-13

II. There is a conflict among the courts of appeals 13-17

III. The faulty construction of this Court's *Farrar* decision effectively nullifies the core purpose of the Civil Rights Attorney's Fees Awards Act of 1976 17-18

IV. There have been faulty constructions of this Court's decisions 18-29

V. Conclusion 29

Appendix A ..... App. 1-App. 7

TABLE OF AUTHORITIES

Page

CASES

Blanchard v. Bergeron, 489 U.S. 87 (1989) ... 18, 24, 26-29

Bristow v. Drake St. Inc., 41 F.3d 345 (7th Cir. 1994) 16

Cabrera v. Jakabovitz, 24 F.3d 372 (2d Cir. 1994) 14

Carey v. Piphus, 435 U.S. 247 (1978) 10-12, 21

City of Riverside v. Rivera, 477 U.S. 561 (1986) 17, 21, 24, 26-29

Carter v. Burch, 34 F.3d 257 (4th Cir. 1994) 16, 25

Cartwright v. Stamper, 7 F.3d 106 (7th Cir. 1993) 16

Cramblit v. Fiske, 33 F.3d 633 (6th Cir. 1994)..... 16

Farrar v. Hobby, 113 S.Ct. 566 (1992)..... *passim*

Jones v. Lockhart, 29 F.3d 422 (8th Cir. 1994)..... 15

Marks v. U.S., 430 U.S. 138 (1977)..... 13

McElroy v. U.S., 455 U.S. 642 (1982)..... 13

Memphis Comm. Schl. Dist. v. Stachura, 477 U.S. 299 (1986) 10-11, 22

Milton v. Des Moines, Iowa, 47 F.3d 944 (8th Cir. 1995)..... 16

Romberg v. Nichols, 48 F.3d 862 (9th Cir. 1995)..... 1

Ruggiero v. Krzeminski, 928 F.2d 588 (2d Cir. 1991) 15

Semayne's Case, 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604) 3

Shapiro v. U.S., 335 U.S. 1 (1948)..... 14

Texas State Teacher's Ass'n v. Garland, 489 U.S. 782 (1989) 2, 15, 28-29

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. 1254(1) 2

42 U.S.C. 1983 i

42 U.S.C. 1988 ..... *passim*

Rule 36, F.R. App. P. 2

SONGS

Grateful Dead, "Truckin'," 1966 3

No. _____

In The

Supreme Court of the United States

October Term, 1994

MICHAEL ROMBERG and DEBRA ROMBERG,

Petitioners,

v.

ROBERT NICHOLS, DENNIS LAZZARI, HUGH LLOYD, BENITO JURADO, and THOMAS LAING,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Romberg and Debra Romberg petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, App. 1-App. 7) was rendered on May 19, 1995, and is reported at 48 F.3d 862.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1995. F.R. App. P. (West 1995) Rule 36. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, in pertinent part, provides:

> In any action or proceeding to enforce a provision of section [ ] . . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

In *Farrar v. Hobby*, 113 S.Ct. 566 (1992) (plurality), this Court held that in certain circumstances, though a civil rights plaintiff was a prevailing party under *Texas State Teachers Ass'n v. Garland*, 489 U.S. 782 (1989), nevertheless that party might not be entitled to any attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. The *Farrar* plurality opinion was used in this case to justify a refusal to award Section 1988 fees in a way that is both contrary to the purposes of the statute, contrary to and inconsistent with prior opinions of this Court, and contrary to the limited holding in *Farrar*.

The long history of this civil rights action filed in 1983 is set forth accurately at part I of the opinion below. App. A at App. 1-App. 7.

A summary of the pertinent facts is that: in late December 1983, five Los Angeles County deputy sheriffs responded to a call concerning an alleged domestic disturbance at the Romberg's residence, just outside the City of Los Angeles, in La Mirada, California. There were no facts either communicated to the deputies or observed by any of the deputies who arrived at the scene to indicate either that there was probable cause to believe anyone inside the Romberg residence had committed a crime, or that exigent circumstances existed such as would have justified a warrantless entry had there been probable cause to enter. Notwithstanding the absence of any known or observed facts to support a warrantless entry into the Romberg residence, the deputies entered the residence without first attempting to obtain a warrant. That entry strikes at the very heart of the Fourth Amendment's warrant clause, and thereby raises in this case a first-order constitutional violation. As was stated in *Semayne's* Case, 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604), "[t]he poorest man may in his cottage bid defiance to all the force of the crown. . . . [T]he King of England cannot enter – all his force dares not cross the threshold of the ruined tenement[:]" more recently put more succinctly by the recently-late Jerry Garcia: "If you've got a warrant I guess you're gonna come in." Grateful Dead, "Truckin'," 1966. Conversely, our entire Fourth Amendment jurisprudence is based on a notion at the bedrock of our Society: without a warrant, and absent

both probable cause and exigent circumstances, police may not enter a residence.

Because defendants' misconduct struck at the heart of our system of ordered liberties, Petitioners' victory against Respondents should not be permitted to be trivialized by the application of Farrar to deny attorneys' fees to Petitioners. By enforcing the provisions of the Fourth Amendment against five sheriff's deputies the Petitioners did something very important, and by returning its verdict against the five deputies, the jury similarly accomplished something very significant, and which Congress attempted to encourage when it enacted the Attorney's Fees Awards Act. Permitting the denial of fees in this case to stand runs directly counter to Congress' purpose, and to the pertinent precedent of this Court.

Pertinent to this Petition are the facts that: (1) though the Petitioners requested a large sum of compensatory damages in their complaint, before their counsel had any opportunity to do any discovery and before the reversal of Petitioners' state court conviction was itself reversed on higher appeal, at the time of trial no actual, provable damages existed, and none were requested from the jury on closing argument; (2) plaintiffs' counsel argued to the jury to award only nominal, and not compensatory, damages; (3) the argument was based on plaintiff Michael Romberg's response "I don't want any damages, what I want is justice[,]" to a question from defense counsel to the effect of "you're just here for money, aren't you?"; and (4) contrary to the speculation of both the district court judge and the court below who adopted his speculation, the request for nominal damages only was not

made to salvage a case that had fallen apart. It was an excellent case, but one with no actual damages.

The court below has perverted the scope and essence of *Farrar*, and has applied it in a way wholly inconsistent with what appears to have been its intent: to make possible a refusal to award Section 1988 attorneys' fees in cases in which there was only "some unspecified way" in which rights were violated, *id.*, 113 S.Ct. at 574 (O'Connor concurring), or in cases in which "a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief. . . . " *Id.*, 113 S.Ct. at 575. It would appear that *Farrar's* plurality takes its substance and meaning from Justice O'Connor's concurrence, but the court below contravened that substance by totally disregarding its criteria: to wit, that in order for there to be no fees awarded to a prevailing plaintiff, it would be necessary: (1) that there be "a substantial difference between the judgment recovered and the recovery sought"[1]; (2) that the award of nominal damages *not* "represent a victory in the sense of vindicating rights even though no actual damages are proved [;]" and (3) that the action was *not* "a tool that ensure[d] the

---

[1] There is no way to ascertain whether "recovery sought" refers to what was sought in the complaint, or what was sought from the jury. It makes no sense to rely on the complaint because it is difficult, if not impossible, for any lawyer accurately to make any assessment of potentially recoverable damages at the time she or he drafts a complaint, and necessarily lawyers ask for more than *might* be recoverable so as not to set any ceiling on what *might* be gotten. This is a practical fact of legal practice. Here, a form complaint was used.

vindication of important rights, even when large sums of money are not at stake. . . . " *Id.*, 113 S.Ct. at 578.

Indeed, the key to Justice O'Connor's concurrence was the finding in *Farrar* that "one searches the [ ] facts in vain for the public purpose this litigation might have served . . . to deter future lawless conduct . . . [or to] identify the kind of lawless conduct that might be prevented [by the judgment for nominal damages]." *Id.*, 113 S.Ct. at 578-79. In *Farrar,* the verdict was characterized as "obtuse," and it was held that "[s]uch a judgment cannot deter misconduct any more than a bolt of lightening can; its results might be devastating, but it teaches no valuable lesson because it carries no discernible meaning." *Id.*, 113 S.Ct. at 579.

It was based on these findings that Justice O'Connor concurred in the result of a no fees award to the prevailing plaintiff in *Farrar,* and on which Justice O'Connor based her legal conclusion that "[i]n this case, . . . the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served – all point to a single conclusion: Joseph Farrar achieved only a *de minimis* victory." *Ibid.*

None of the stated indicia of "no fees at all," as set forth in *Farrar* is present in this case.

(1) There is no difference at all between the judgment recovered and the recovery sought *from the jury.* Indeed, the pretrial conference order, which, in the Central District of California, supersedes the pleadings, sets forth no damages claim in any amount.

(2) There was an award in the precise sum requested from the jury: one dollar to each of the two plaintiffs.

(3) The victory was one in which a unanimous jury found that five Los Angeles County sheriff's deputies violated the core Fourth Amendment right that protects the sanctity of one's home, by entering plaintiffs' home absent a warrant, absent probable cause, absent exigent circumstances, and absent consent.

(4) The action *was* a tool that vindicated and insured the vindication of important rights, even though no large sum of money was involved.

(5) There was the important public purpose of protecting the sanctity of the home achieved in this action; and that purpose must be presumed to have been served by the jury's finding of culpability, in the face of the defendants' claim that both probable cause and exigent circumstances legally justified the admittedly warrantless entry into plaintiffs' home.

(6) The verdict was not "obtuse," but was clear in its message that unreasonable entries into a home are unconstitutional and will be found to be so, on proper proof to a jury.

(7) More than "a bolt of lightning," the judgment can deter misconduct because it teaches, at least, the five defendants not to do again what they did in this case. Police who suffer through a trial and against whom a verdict is returned, if only for nominal damages, do receive the important message from the community that there is disapproval of their conduct, and that it is expected that the conduct not be repeated. This is a

valuable lesson for them, it carries a discernible meaning, and it can have meaning for others to whose knowledge it comes.

(8) The extent of the relief was unlike the abstract relief in *Farrar;* the legal issue, unlike in *Farrar,* was significant; and the public purpose served – vindication of important, first-order constitutional rights – is precisely what Congress envisioned and intended when it enacted 42 U.S.C. 1988. Thus, there was no *de minimis* victory in this case, and the refusal to award fees was erroneous.

A fair reading of the facts of this case and application of the principles of *Farrar,* and prior decisions of this Court, all render the opinion of the court below erroneous and all warrant its reversal by this Court.

REASONS FOR GRANTING THE PETITION

The reasons for granting the Petition are these:

1. The court below has decided an issue in a way that grossly misinterprets controlling Supreme Court precedent, is contrary to controlling legal principles, and will wreak havoc on civil rights litigation in the entire Ninth Circuit: it will operate to discourage lawyers from taking on meritorious civil rights cases in which there is no prospect of damages. This effect is directly contrary both to Congress' intent in enacting 42 U.S.C. 1988 and to controlling precedent from this Court.

2. The courts of appeals are in direct conflict over the question of whether a plaintiff who recovers nominal

damages in a civil rights action is entitled as a prevailing party to recover attorneys' fees.

3. The faulty construction of *Farrar* effectively nullifies the core purpose of 42 U.S.C. 1988, and also nullifies the clear holdings of two prior decisions by this Court.

4. There has been a faulty construction of an important decision of this Court, and prior decisions of this Court which should have given substance to and should have animated *Farrar* were disregarded.

I

BECAUSE THE OPINION OF THE COURT BELOW WILL OPERATE TO DISCOURAGE LAWYERS FROM TAKING CIVIL RIGHTS CASES THAT ARE MERITORIOUS, BUT IN WHICH THERE IS NO PROSPECT OF DAMAGES, CERTIORARI SHOULD BE GRANTED.

This Court should grant review to resolve the important question of whether facilitating representation for victims of constitutional violations requires that attorneys' fees may be recovered when a plaintiff prevails but there is no economic recovery.

Because the important purpose of Section 1988 is to facilitate representation for victims of constitutional violations, those whose rights have been violated should be encouraged, and not discouraged, to sue both to receive compensation (when it is available) and, at least as importantly, to deter future constitutional violations (by the same defendants, or by others).

Therefore, any plaintiff who sues and who prevails by establishing a constitutional violation should recover attorneys' fees.

This case poses the important and unresolved question of whether attorneys' fees may be recovered when a plaintiff prevails, but there is a constitutional injury without any economic loss. Many important constitutional violations do not have quantifiable economic damages, and this case raises the significant issue whether a successful plaintiff in such a case may recover attorneys' fees.

The only effect the opinion below will have is to discourage competent lawyers from taking meritorious civil rights cases, but in which there is no prospect of damages other than nominal damages. It is difficult to imagine any other consequence the opinion below will have.

In *Carey v. Piphus*, 435 U.S. 247, 264 (1978), this Court held that the plaintiff "could recover compensatory damages only if he proved actual injury caused by the denial of this constitutional rights[,], *Stachura*, 477 U.S. at 307, and in *Stachura* this Court "emphasized that, whatever the constitutional basis for § 1983 liability, such [compensatory] damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.' " *Statura*, 477 U.S. at 309 (quoting *Carey*, 435 U.S. at 265 [emphasis in original]).

In clarifying its holding in *Carey*, in *Stachura* this Court said that:

> Our discussion of that issue [of compensatory versus nominal damages] makes clear that nominal damages, and not damages based on some undefinable "value" of infringed rights are the appropriate means of "vindicating" rights whose deprivation has not caused actual, provable injury.
>
> "Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."

477 U.S. 299, 308 n. 11 (1986) (quoting *Carey*, 435 U.S. at 266 [footnote omitted]).

In this case, the Fourth Amendment rights violated are "absolute rights" as defined in both *Carey* and *Stachura*. Thus, those rights, when "not shown to have caused *actual injury*," as here, are rights which "[c]ommon law courts traditionally have vindicated . . . through the award of a nominal sum of money," as here. They are rights whose "deprivation . . . [is] actionable for nominal damages *without proof of actual injury.*"

For this Court's holdings in any of its cases, principally *Farrar*, to be interpreted to mean that violation of an

absolute right whose violation is actionable for nominal damages will result in a denial of an attorneys' fees award would be entirely contrary to what this Court has held.

Surely, neither Congress nor this Court ever intended to remove this entire category of cases, as defined by *Carey*, from the application of Section 1988. Yet, the decision of the court below in this case accomplishes precisely that result: it makes attorneys' fees unavailable in cases in which there are no provable, actual damages, and in which nominal damages are sought, and are the only damages recoverable. It makes a null set out of a populated class defined by this Court: it makes nothing out of something.

Because Section 1988 fees must be available to prevailing plaintiffs in nominal damages cases in which nominal damages are sought because there are no provable, actual damages, certiorari must be granted in this case. What is sought after the case has been developed, after discovery has been taken, and after all of the facts have been developed in trial, necessarily must control the evaluation of provable, actual damages. Unlike issues of subject matter or personal jurisdiction, which are judged as of the time the complaint is filed, the issue of whether or not a case is a so-called nominal damages case must be judged at the time damages are requested at trial. As a practical matter, lawyers, and especially lawyers in police misconduct civil rights cases, should not be held to their guesses about damages, because Congress did not intend to make awards of Section 1988 fees dependent on speculation.

This Court should overturn or explicate *Farrar*, because *Farrar* has caused circuit courts of appeal to discourage competent lawyers to undertake plaintiffs' Section 1983 cases that do not have a prospect of damages. This unintended result is wholly contrary to the purposes of Section 1988, contravenes congressional intent and the interpretations of Section 1988's purposes by this Court, and puts a knife into the heart of vigorous enforcement of the civil rights laws by competent attorneys. The mischief engendered by *Farrar* undermines the civil rights laws of the United States, and therefore, it must be overturned or explained in a way that will staunch courts from denying attorneys' fees to successful civil rights plaintiffs whose cases have no monetary value.

Because the consequence of the opinion below is both contrary to Congress' intention in enacting Section 1988 and contrary to this Court's interpretation of Section 1988, certiorari should be granted.

II

THE COURTS OF APPEALS ARE IN DIRECT CONFLICT OVER THE QUESTION OF WHETHER A PLAINTIFF WHO RECOVERS NOMINAL DAMAGES IN A CIVIL RIGHTS ACTION IS ENTITLED AS A PREVAILING PARTY TO RECOVER ATTORNEYS' FEES.

A grant of certiorari is warranted when federal courts of appeals are in conflict on an issue. *McElroy v. U.S.*, 455 U.S. 642, 643 (1982) ("a conflict among the Circuits on [an] issue of statutory construction [warrants a grant of certiorari]"); *Marks v. U.S.*, 430 U.S. 188, 189

(1977) ("to resolve a conflict in the Circuits" certiorari granted). When the question on which there is a conflict is an important and recurring one, as here, certiorari is warranted. *Shapiro v. U.S.*, 335 U.S. 1, 4 (1948) ("because this conflict [among the circuits] involves an important question of statutory construction" certiorari granted).

The question of whether, after this Court's decision in *Farrar*, a civil rights plaintiff who is a prevailing party under 42 U.S.C. 1988, but who recovers nominal damages, in a case involving a gut constitutional issue (as opposed to the sort of business issue raised in *Farrar*) is entitled to an award of attorneys' fees, is an important issue of statutory construction, of interpretation of *Farrar*, is a recurring question over which the circuit courts of appeals are irreconcilably divided, and therefore certiorari should be granted.

On the one hand, the Second and Eighth Circuit Courts of Appeals, in post-*Farrar* decisions have determined that plaintiffs who prevail in civil rights actions but who recover nominal damages are entitled to attorneys fees.

In *Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2d Cir. 1994), the court held that, holding that "[t]he fact that plaintiffs obtained only one dollar in damages . . . does not automatically exempt [defendant] from paying any share of plaintiffs' attorney's fees. . . . [Because] the plaintiffs prevailed on a significant legal issue [they are entitled to attorneys' fees]. . . . " (Quoting from *Farrar:* "[A]n award of nominal damages can represent a victory in the sense of vindicating important rights even though no actual damages are proved." 113 S.Ct. at 578 [O'Connor, J.,

concurring]). The Second Circuit's allowance of fees is grounded in its tradition that "[a] jury's determination that . . . fourth and fourteenth amendment rights were violated by [a] search conducted by [police o[fficers assuredly is significant." *Ruggiero v. Krzeminski*, 928 F.2d 558, 564 (2d Cir. 1991) (a pre-*Farrar* case in which nominal damages were held to support an award of attorneys' fees based on this Court's "generous formulation" of entitlement to attorneys' fees set forth in *Texas State Teachers Ass'n v. Garland*, 489 U.S. at 792; *Ruggiero*, 928 F.2d at 564).

In this case, this Court should consider whether *Farrar* has been used inappropriately to displace this Court's "generous formulation" as set forth in *Garland*, and also should consider whether *Farrar* was intended to be used or has been used inappropriately to bring down to the same level as a mere business interest (as in *Farrar*) "a jury's determination that . . . fourth . . . amendment rights were violated by [an entry and] search conducted by [policy o]fficers [which] assuredly is significant." *Ruggiero*, 928 F.2d at 564. *Farrar* could not have intended that violation of business interests rose to the same level as the core Fourth Amendment right to the sanctity of one's home: indeed, application of *Farrar*, as here, to Fourth Amendment rights impermissibly trivializes and degrades the Fourth Amendment.

At a minimum, this Court must take this case in order to draw a distinction between business rights and core constitutional rights, insofar as application of *Farrar* is concerned.

In *Jones v. Lockhart*, 29 F.3d 422, 423-24 (8th Cir. 1994), the court held that "[t]he *Farrar* holding does not prohibit

a fee award in this case [in which nominal, compensatory damages of $1.00, and punitive damages of $1.00 were awarded]." The court based its holding on the premise "that vindication of the constitutional right to be free from cruel and unusual punishment is a significant legal issue in contrast to the injury to a business interest alleged in Farrar[,]" and also stated that "civil rights litigation serves an important public purpose . . . vindicating a policy that Congress considered of the highest priority." (Internal quotation marks omitted) (quoting from *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 [1968]). Here, the constitutional right under the Fourth Amendment is at least as important as the Eighth Amendment right in *Jones*. *But see, Milton v. Des Moines, Iowa*, 47 F.3d 944, 946, 947 (8th Cir. 1995) (acknowledging *Jones*, stating that "[w]ere we the district court, we might have reached a different result[,]" acknowledging the relatively less significant business issue alleged in *Farrar* than the Fourth Amendment right there at bench, but nevertheless upholding a no attorneys' fees award in a nominal damages case).

On the other hand, the Ninth (in this case), Fourth, Sixth, Seventh, and Eighth Circuits have refused to award attorneys' fees in nominal damages cases. *Carter v. Burch*, 34 F.3d 257, 265-66 (4th Cir. 1994); *Cramblit v. Fiske*, 33 F.3d 633, 634-36 (6th Cir. 1994); *Bristow v. Drake St. Inc.*, 41 F.3d 345, 353 (7th Cir. 1994); *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993); *Milton*, 47 F.3d at 946-47.

It is apparent that there is a serious conflict among the circuit courts of appeals on the question of whether a prevailing plaintiff who recovers nominal damages in a

Bill of Rights-based civil rights case may recover attorneys' fees under Section 1988. On this basis, this Court should grant certiorari either to (1) overturn *Farrar,* (2) to explicate *Farrar,* or (3) to modify *Farrar*'s reach so that it does not grasp and strangle civil rights litigation.

III

THE FAULTY CONSTRUCTION OF *FARRAR* EFFECTIVELY NULLIFIES THE CORE PURPOSE OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

As is set forth above,

> because "the public as a whole has an interest in the vindication of the rights conferred by statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff[,] . . . [and because d]amages awards do not reflect fully the public benefit advanced by civil rights litigation[ ] . . . Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief. Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages. [¶] (*"The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel."*)

City of Riverside v. Rivera, 477 U.S. 561, 574-75 (1986) (emphasis added).

The instant case is one "which might otherwise [have] be[en] abandoned because of the financial imperatives surroundings the hiring of competent counsel" had it not been for the Attorney's Fees Awards Act. Indeed, it is a case that never would have been brought had it not been for the Act. The action clearly had merit, but just as clearly had no monetary value.

The court below placed "an undesirable emphasis . . . on the importance of the recovery of damages . . . [and completely disregarded t]he intention of Congress . . . to encourage successful civil rights litigation, not to create a special incentive to prove damages. . . . " *Blanchard v. Bergeron*, 489 U.S. 87, 95-96 (1989).

By placing its *entire focus* on damages, the court below did exactly what this Court instructed not be done in *Blanchard*, and it stripped the purpose from Section 1988. By so doing, the court below significantly erred and in effect nullified Section 1988.

IV

THERE HAS BEEN A FAULTY CONSTRUCTION OF AN IMPORTANT DECISION OF THIS COURT, *FARRAR*, AND TWO PRIOR DECISIONS OF THIS COURT WHICH SHOULD HAVE BEEN TAKEN INTO ACCOUNT, *CITY OF RIVERSIDE V. RIVERA* AND *BLANCHARD V. BERGERON*, WERE DISREGARDED BY THE COURT BELOW.

1. *Farrar v. Hobby* was not interpreted correctly by the court below.

In *Farrar*, no damages were awarded because the "conspiracy was not a proximate cause of any injury

suffered . . . [and because] the jury made no findings in favor of Dale Farrar." 113 S.Ct. at 570. In the instant case, contrary to what occurred in *Farrar*, it was found that the Respondents' unconstitutional conduct was the proximate cause of the constitutional injury suffered by plaintiffs, and the jury did find in favor of Petitioners.

In *Farrar*, "[t]he [appeals] court affirmed the failure to award compensatory or nominal damages against the conspirators because the plaintiffs had not proved an actual deprivation of a constitutional right." *Ibid.* In the instant case, contrary to what occurred in *Farrar*, there was neither any request for compensatory damages nor any failure to award nominal damages. Nominal damages were requested from the jury and awarded by the jury. Nor in this case did Petitioners fail to prove an actual deprivation of a constitutional right. On the contrary, here Petitioners proved the deprivation of a constitutional right.

Against the facts of *Farrar*, this Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988." *Id.* at 573. And against the facts of *Farrar*, this Court also held that "the prevailing party inquiry does not turn on the magnitude of the relief obtained." *Ibid.*

This Court went on to hold, again against the facts present in *Farrar*, that when rights are violated "in some unspecified way . . . even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but received no more than nominal damages is often such a prevailing party[ ] . . . [because] the awarding of nominal

damages . . . highlights the plaintiff's failure to prove actual, compensable injury." *Id.* at 574-75. Here, rights were proved to have been violated in a particular, specified way, and not in some unspecified way. Here, plaintiffs did not seek from the jury any compensatory damages, and received the nominal damages for which they asked. Here, there was no failure to prove actual, compensable damages. There simply were no such damages to be proved, and characterizing as a failure to prove that which could not be proved and need not be proved is a misnomer.

Farrar did not take account of cases such as the instant case, of which there are many, and its holding that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all[,]" *id.* at 575, could not have been intended by this Court to apply to this case, or any other case like it, in which the award of nominal damages was not a result of a failure to prove entitlement to monetary relief, but was a result of the fact that there were no compensable damages and the fact that plaintiffs sought only nominal damages from the jury.

In the concurrence of Justice O'Connor, which gives meaning and force to the plurality, it clearly is set forth that a refusal to award fees in nominal damages cases is not a correct result absent those considerations listed by Justice O'Connor.

First, one may "not say that *all* nominal damages awards are *de minimis*. Nominal relief does not necessarily a nominal victory make." *Id.* at 578. And, though "a

substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical [,]" still "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved." *Ibid.* (citing *Carey v. Piphus*, 435 U.S. 247, 254 [1978]). Thus, "courts also must look to other factors [besides damages, and o]ne is the significance of the legal issue on which the plaintiff claims to have prevailed." *Ibid.* (citing *Garland*, 489 U.S. at 792).

In this case, based on its facts, the result hardly was *de minimis*. There was no difference at all between the sum sought from the jury and the sum awarded by the jury, and thus there is no suggestion that the victory was purely technical. The award of nominal damages in this case represents a victory in the sense that it is a vindication of plaintiffs' important constitutional rights. And, it is important to look to the factor that plaintiffs' verdict vindicated one of the most important rights in this Country, the right to be secure in one's own home against arbitrary and lawless invasions by officers of the government.

Second, Justice O'Connor premises her concurrence in *Farrar* on the concept that though "Section 1988 is not 'a relief Act for lawyers[,]" 113 S.Ct. at 578 (quoting *Riverside v. Rivera*, 477 U.S. at 568 [Rehnquist, J., dissenting]), nevertheless "it is a tool that ensures the vindication of important rights, even when large sums of money are not at stake. . . . " *Ibid.* This premise is controlling law, and is consistent with both *City of Riverside* and *Blanchard*, discussed below.

Third, in *Farrar*, Justice O'Connor "searche[d] the[ ] facts in vain for the public purpose th[e] litigation might have served." 113 S.Ct. at 578. Here, the facts read even superficially warrant the conclusion that this litigation served the very purpose intended by Congress when it enacted Section 1988: to encourage lawyers to take on cases in which constitutional rights had been violated, but in which there was no monetary incentive to do so, but for the existence of Section 1988. It is not for any court to eviscerate Congress' intent by imposing on its enactment restrictions that never were envisioned by Congress: to wit, a requirement that in a case in which there was a clear violation of the Constitution, a condition precedent to an award of attorneys' fees be a recovery of actual damages, when in fact there were no actual damages. Because this Court has held that the so-called abstract value of a right violated may not serve as a basis for any award of compensatory damages, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), a civil rights plaintiff no longer is permitted to ask for actual damages predicated on the value of the right proved to have been infringed. Having taken from a civil rights plaintiff the ability to ask for actual damages when no actual damages can, as a matter of fact, be proved, it would be perverse to hold that there can be no award of attorneys' fees under Section 1988 when all that legally can be requested from the jury is nominal damages.

Fourth, unlike *Farrar*, in which Justice O'Connor noted that though the "District Court speculated that the judgment, if accompanied by a large fee award, might deter future lawless conduct . . . but did not identify the kind of lawless conduct that might be prevented[,] 113

S.Ct. at 579, here, there is no question but that the lawless conduct found and the lawless conduct to be deterred is identified precisely as lawless entries into residences. Here, a large fees award would operate to deter lawless invasions of residences. And, unlike *Farrar*, in which "the conduct to be deterred [is not] apparent from the verdict, which even petitioners acknowledge is 'regrettably obtuse[,]' " *ibid*, here, the conduct to be deterred is apparent from the verdict, which is not obtuse in any respect. Thus, here, the "judgment can[ ] deter misconduct [because] . . . more than a bolt of lightning . . . its results might be devastating [and] . . . teach[ ] [a] valuable lesson because it carries [a] discernible meaning [,]" *ibid.*: if you are a police officer, especially a Los Angeles County deputy sheriff, stay out of people's residences unless there is probable cause and exigent circumstances that permit you to enter. Hardly could there be a more straight-forward lesson with a discernible meaning, a valuable lesson to law enforcement, and with considerably more precision than "don't eat the daisies."

Fifth, "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served – all point to a single conclusion[,]" *ibid.*; a conclusion different than the one in *Farrar*, a conclusion that there be a fees award because (1) the extent of the relief obtained was all of the relief that was available; (2) the significance of the legal issue on which Petitioners prevailed – vindication of important, first-order constitutional rights – is as high as it could be; and (3) no higher public purpose could be achieved by Section 1983 litigation than the vindication of Fourth Amendment rights in protection of the sanctity of one's home.

Thus, because of the facts present in this case, and its difference from *Farrar,* the victory here was not *de minimis* and thus warranting no fees award, but was significant and warranted an award of fees.

2. Both *City of Riverside v. Rivera* and *Blanchard v. Bergeron* were ignored by and contravened by the court below.

The court below seizes on the *Farrar* statement that "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all[ ] [and that] . . . the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." Slip op. at 5460 (quoting from *Farrar,* 113 S.Ct. at 574).

Contrary to the finding that the Petitioners "are a perfect example of plaintiffs who should receive no attorney's fees at all[,]" slip op. at 5460, because "[their] strategy [to] trump *Farrar* [by asking for only nominal damages to save a weak case from a loss]," slip op. at 5461, it neither is the case that Petitioners ever tried to "trump" *Farrar,* nor is it the case that an award of attorneys' fees to the prevailing plaintiffs would not be fully in accord with the purposes of Section 1988, and with *Farrar.*

The court below does nothing less than try to make civil rights litigants stay away from the federal courts. It is no small secret that the federal courts have become more and more hostile to civil rights plaintiffs, wanting, instead, to preserve the hallowed halls of justice for the wealthy, the business interests, and the others who do not

bring to the federal courts the acrimonious battles that are civil rights litigation.

Yet this predilection should make no difference to judges, who would follow clear Supreme Court precedent, and it is in light of that precedent, with which *Farrar* is consistent, that this Court should grant certiorari.

It still is the law that:

> a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. *See Carey v. Piphus*, 435 U.S. 247, 266 . . . (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . . " *Hensley*, 461 U.S. at 444, n. 4. . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.
>
> The deterrent effect [of civil rights actions, even when no damages are awarded] is particularly evident in the area of individual police misconduct [Section 1983 cases]. . . . Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit " 'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.' " House Report, at 2 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 . . . [1968]).
>
> . . . .

> [D]amages awards do not reflect fully the public benefit advanced by civil rights litigation[ ] [and] Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief. . . . Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.
>
> . . . .
>
> Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so[.] . . . *See also Kerr v. Quinn*, 692 F.2d 875, 877 (CA2 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.").

City of Riverside, 477 U.S. at 574-78. Justice Powell in his concurring opinion stated that "[n]either the decisions of this Court nor the legislative history of § 1988 support such a 'rule' [that there be so-called "proportionality" between a Section 1988 judgment amount and the amount of fees awarded – the central holding in *City of Riverside*]." *Id.* at 585 (Justice Powell concurring).

This Court reaffirmed, in an 8-1 opinion, the heart of *City of Riverside* in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), while deciding the issue of whether *vel non* the contingent fee retainer contract between an attorney and his or her client in a Section 1983 action could operate as a ceiling on the amount to be awarded under 42 U.S.C.

1988. (It held the contingent fee retainer amount could not be such a ceiling.)

The Court, in reaffirming the spirit of *City of Riverside,* held that

> [i]t is clear that Congress "intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because *the rights involved may be non-pecuniary in nature.*" S.Rep. No. 94-1011, at 6, U.S. Code Cong. & Admin. News, 1976, p. 5913.
>
> *[A]n undesirable emphasis might be placed on the importance of the recovery of damages in civil rights cases. The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages.* . . . Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages.
>
> "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside v. Rivera,* 477 U.S. 561, 574 . . . (1986).

Blanchard, 489 U.S. at 95-96 (emphasis added).

The holding of the court below is a perverse application of *Farrar* to the facts of this action and must be undone. The opinion in this case runs directly counter to and is in clear conflict with this Court's holdings in both

City of Riverside and *Blanchard*. What's more, the court below incorrectly applied *Farrar*.

A careful reading of *Farrar* demonstrates that *its* facts, as gone into carefully in Justice O'Connor's concurrence, did warrant a result of no fees, but that the twisted application of *Farrar* to the facts of the instant case is wholly unwarranted.

Texas State Teacher's Assn. v. Garland, 489 U.S. 782 (1989), and *Farrar* both provided invitations to the perversion visited on Petitioners in this case. Notwithstanding those invitations, it was the duty of the court below to follow the clear precedent of both *City of Riverside* and *Blanchard*, and to read *Farrar* in light of and consistently with *City of Riverside* and *Blanchard*: not to make believe that a case such as the instant case that resulted in an award of nominal damages, not for the speculated reason offered by the court below but because there just were no compensable damages for an entry into a home in which no one was injured and no property was damaged or destroyed, is not a case in which Congress intended that Section 1988 fees not be awarded.

In no wise is this case similar either to *Garland*, in which, in essence, plaintiff really had no standing in the first instance to bring the suit because it had not been harmed and could not benefit from the judgment, or *Farrar*, which had particularly peculiar facts. Neither *Garland* nor *Farrar* fairly can be read to suggest that in a Section 1983 police misconduct case based on alleged and proved Fourth Amendment violations against residents of a home, fees should not be awarded when it has been proved that those first-order rights were violated. This

case has no similarity at all either to *Garland* or to *Farrar,* and *Farrar* may not be used to justify not granting fees in this case.

Far from being "a perfect example of plaintiffs who 'should receive no attorney's fees at all[,]' " slip op. at 5460, Petitioners are an example of persons who did *precisely* what the Supreme Court described in *City of Riverside* and *Blanchard,* and then were subjected to a misapplication of *Farrar.*

V

CONCLUSION

For the reasons set forth, this Court either should grant the Petition for Certiorari, or should summarily reverse the judgment of the court of appeals in order to effectuate a proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976 and of the decisions of this Court in its cases cited above.

The Petition for Certiorari should be granted.

Respectfully submitted,

STEPHEN YAGMAN
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200

Attorneys for Petitioners, Michael Romberg and Debra Romberg

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ROMBERG, DEBRA ROMBERG, *Plaintiffs-Appellants,* v. ROBERT NICHOLS, DENNIS LAZZARI; HUGH LLOYD; BENITO JURADO; THOMAS LAING, et al., *Defendants-Appellees.*	No. 93-56296 D.C. No. CV-83-8448-RG ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Submitted December 2, 1994*
San Francisco, California

Filed February 24, 1995
Amended May 19, 1995

Before: J. Clifford Wallace, Chief Judge; David R. Thompson and Diarmuid F. O'Scanlain, Circuit Judges.

Opinion by Judge O'Scanlain

*The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit Rule 34-4.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiffs-appellants.

Scott A. Taryle, Cotkin & Collins, Los Angeles, California, for the defendants-appellees.

ORDER

The opinion filed at slip op. 2041 on February 24, 1995 is amended as follows:

Slip op. at 2045, line 5 of first full paragraph:

Delete: "The Rombergs sought Supreme Court review."

Insert: "The deputies sought Supreme Court review."

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

With the exception of the amendment indicated above, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANLAIN, Circuit Judge:

When a jury returns a plaintiff's verdict in a civil rights case in the amount of one dollar, must the court also award the plaintiff attorney's fees?

I

In late December 1983, Michael and Debra Romberg filed suit under 42 U.S.C. § 1983 against several Los Angeles sheriff's deputies and against the County of Los Angeles itself. The Rombergs alleged, among other things, that the deputies had violated their constitutional rights by not obtaining a search warrant before entering their home in response to a call about a domestic disturbance in 1982.[1] The Rombergs sought $2 million in general punitive damages, along with attorney fees and costs. After trial, a jury found in favor of the Rombergs, but only awarded $1 to each of them. In his closing argument, Stephen Yagman, the Rombergs' attorney, informed the jury that, in his view his clients were entitled to damages " 'in some sum like one dollar.' "[2]

The Rombergs, asserting their status as prevailing parties under 42 U.S.C. § 1988, sought an award of attorney's fees in the amount of $45,000. The district court

---

[1] The district court dismissed the County and most of the Rombergs' claims before trial, but it declined to dismiss the Fourth Amendment claim against the remaining defendants.

[2] *Romberg v. Nichols*, No. 83-8448 at 2 (C.D. Cal. Jan. 20, 1989) (quoting trial transcript).

granted the Rombergs' motion, but only in the amount of $5,000.

The deputies appealed, arguing that even the reduced award was unmerited. This court found that it was "unable to review the order as written," and vacated and remanded. *Romberg v. Nichols*, No. 87-6724 at 1 (9th Cir. Aug. 16, 1988). In response, the district court issued a more detailed order, this time awarding the Rombergs attorney's fees in the amount of $29,137.50. *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Jan. 20, 1989).

The deputies appealed once again, arguing that the Supreme Court's decision in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), issued after the district court's order, precluded any award of fees to the Rombergs. This court again vacated the district court's order and remanded for a specific determination of whether *Texas State Teachers* in fact precluded the Rombergs from recovering fees. *Romberg v. Nichols*, Nos. 89-55202 & 89-5218 (9th Cir. May 25, 1990) [904 F.2d 41 (Table)]. The district court summarily rejected this contention, reinstating the $29,137.50 award. *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Aug. 17, 1990).

The deputies appealed once again, but this time the Rombergs cross-appealed, insisting the district court's order was unjustifiably low. We affirmed the award, *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir.), *as amended*, 970 F.2d 512 (1992). The deputies sought Supreme Court review. The Court granted certiorari and remanded the case for reconsideration in light of the Court's recent opinion in *Farrar v. Hobby*, 113 S. Ct. 566 (1992). We, in turn, once again vacated the award of fees and remanded

for reconsideration. *Romberg v. Nichols*, 993 F.2d 1453 (1993).

On remand, the district court, applying the principles articulated in *Farrar*, denied the Rombergs' fee request altogether, from which order the Rombergs now appeal.

II

[1] It is undisputed that the Rombergs are "prevailing parties" in this suit. As *Farrar* established, even a plaintiff who wins only nominal damages is a prevailing party under section 1988. *Farrar*, 113 S. Ct. at 573. The Rombergs' status as prevailing party does not necessarily entitle them to attorney's fees, however. Indeed, as the Court emphatically explained, "[i]n some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." *Id.* at 575. Rather, "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Id.* at 574 (internal quotation and citation omitted).

[2] In light of the new *Farrar* standard, we must now conclude that the Rombergs are a perfect example of plaintiffs who "should receive no attorney's fee at all." As in *Farrar*, the Rombergs requested a substantial sum, but received only one dollar each; although they prevailed, the Rombergs did not succeed. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Id.* at 575 (internal citation omitted).

[3] The Rombergs attempt to distinguish their case by arguing that, unlike the plaintiffs in *Farrar,* they have consistently sought only nominal damages. Thus, they conclude, the fact that the jury awarded them only $1 each says nothing about the success of their claim, for they received exactly what they sought. In particular, the Rombergs contend that although they prayed for compensatory and punitive damages, the complaint was superseded by a pretrial order in which they sought only nominal damages. In addition, they point to Mr. Yagman's closing argument, in which he suggested to the jury on the Romberg's behalf that an award in the amount of "one dollar" might be appropriate.

The record belies the Rombergs' first contention. The complaint indicates that the Rombergs initially sought $2 million in punitive and compensatory damages against each of eight sheriff's deputies. The pretrial order shows no reduction in this request.

[4] Unlike the first, the Rombergs' second contention is accurate – Mr. Yagman, in his closing argument, indeed suggested that, if nothing else, his clients should at least be awarded nominal damages. Such a strategy cannot trump *Farrar,* however, An attorney cannot avoid *Farrar's* mandate by waiting until the close of trial and then, when he perceives that his clients have little chance of success, asking for only nominal damages to justify an attorney's fee award. "[F]ee awards under § 1988 were never intended to produce windfalls to attorneys." *Farrar,* 113 S. Ct. at 575 (quotation omitted); for us to overrule the trial judge in this case would have precisely such effect.

Finally, despite their vague allusions to the preservation of the "sanctity of the home," the Rombergs have failed to identify any nonmonetary successes resulting from their litigation efforts against the Sheriff's Department or individual deputies. As this court has recognized, "[i]f the lawsuit achieved other tangible results – such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees." *Wilcox v. City of Reno*, No. 93-16448, slip op. 15169, 15178 (9th Cir. Dec. 8, 1994). Such "tangible results" are utterly lacking in the record of this case.

The denial of attorney's fees is

AFFIRMED.

FILED

(2) 95-362 AUG 17 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

MICHAEL ROMBERG and DEBRA ROMBERG,

Petitioners,

v.

ROBERT NICHOLS, DENNIS LAZZARI, HUGH LLOYD, BENITO JURADO, and THOMAS LAING,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

STEPHEN YAGMAN
MARION R. YAGMAN
YAGMAN & YAGMAN, P.C.
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200

Attorneys for Petitioners, Michael Romberg and Debra Romberg

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

Page

Court of Appeals Memorandum reversing district court initial award of attorneys' fees, 8/16/88 1-2

District Court Order, on remand, awarding attorneys' fees, 1/20/89 3-6

Supreme Court letter indicating certiorari was granted and vacating the fees award of 1/20/89, which had been affirmed by the Court of Appeals at 953 F.2d 1152 (9th Cir. 1992) 7

Court of Appeals Order on remand after grant of certiorari, 6/8/93 8-9

District Court Order, on remand from Court of Appeals, granting no fees, 8/16/93 (from which Petitioners appealed, and from which appeal, 48 F.3d 453 (9th Cir. 1995), the instant Petition for Certiorari is taken) 10-12

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG, Plaintiffs-Appellants, -vs- ROBERT NICHOLS; DENNIS LAZZARI; ADOLF LLOYD, BENITO JURADO; CALIGULA LAING; DRACO CAMBIEU; JESABEL HANNON; COUNTY OF LOS ANGELES, Defendants-Appellees.	No. 87-6724 D.C. No. CV-83-8448-RG MEMORANDUM (Filed Aug. 16, 1988)

Appeal from the United States District Court for the Central District of California Richard A. Gadbois, Jr., District Judge, Presiding Argued and Submitted August 1, 1988 Pasadena, California

Before: WALLACE, FARRIS, and WIGGINS, Circuit Judges.

The issue before us is whether the district court erred in its award of $5,000.00 attorney's fees to a prevailing civil rights plaintiff pursuant to 42 U.S.C. § 1988 when a claim is made for fees of $45,000.00.

The district judge did not, in his order, set a lodestar figure, *see Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1982), nor identify the amount of reduction pursuant to an analysis of factors identified in *Kerr v. Screen Actors Guild*,

Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976). We are, therefore, unable to review the order.

We vacate and remand for the district court to issue a new order. We express no view as to whether the fee set by the district court was inadequate.

VACATED AND REMANDED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

A TRUE COPY
ATTEST 9/8/88

Cathy A. Catterson
Clerk of Court

by: /s/ R. Caldwell
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ROMBERG, et al., Plaintiffs, v. ROBERT NICHOLS, et al., Defendants.	CASE NO. CV83-8448 RG ORDER (Filed Jan. 20, 1989)

This court's award of attorneys fees to plaintiffs' counsel was reversed by the Court of Appeals on August 16, 1988. This order resets the fees in accordance with that mandate.

This was a § 1983 civil rights action. The case that went to the jury had been considerably pared down prior to deliberation. The public entity defendant was dismissed before trial. The court removed from the case the excessive force, conspiracy, malicious prosecution and false arrest claims. The case was expeditiously tried. At argument plaintiffs' counsel did not ask for money, other than a perfunctory request for punitive damages. He stated: "And Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award them what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages." (R. Tr. p. 22)

While the court does not doubt counsel's overall sincerity in this part of the argument his request gave the jury a clear opportunity for a Solomonic solution. In this court's view the officers involved were acting out of genuine concern for human safety during the incident and if their actions were a technical violation of the Fourth Amendment that was wholly unintended. It is very likely that the jury would have returned a defense verdict but for the option of the one-dollar award, which was very pointedly suggested to them.

The following is an analysis of the *Kerr* factors by which the court arrives at the lodestar figure:

1. The plaintiffs' counsel claims 201.5 prior to appeal. The court has no meaningful method of either verifying that time or surgically excising time that might have not been reasonably necessary. It will accordingly be accepted at face value. The same may be said for the supplementary request for 24 hours and 51.75 hours on appeal.

2. The case was not novel. It did take skill under the circumstances, but the above observation about the jury's option is a reducing factor.

3. Mr. Yagman is a skilled and effective civil rights trial lawyer. As such, however, he should have realized that there was little or nothing to support the claims that never got to the jury – again, a significant reducing factor.

4. Of course there was "preclusion of employment" in the sense that a lawyer cannot work on two cases at the same precise time,

but other than that metaphysical nicety this is a neutral factor.

5. The court is very familiar with customary fees in litigation of this type for lawyers of experience. The range is wide – perhaps $150-225/hr. A rate of $175, well within the range, is selected for this case. (It is recognized that a higher rate for the same lawyer was selected in the recent past by this judge.)

6. The fee was obviously contingent and is a neutral factor here.

7. There were no time limitations.

8. The results obtained were (i) $2.00 in cash and (ii) "vindication." If all plaintiffs wanted was vindication they could have made the case a straightforward Fourth Amendment claim from the outset. This is clearly a reducing factor.

9. The experience and ability of Mr. Yagman are fully documented.

10. There was nothing "undesirable" about this case.

11 &
12. Both factors are irrelevant to this determination.

The presumptive lodestar figure is $48,562.50 (277.5 x 175). The lodestar figure selected by the court, however, is $29,137.50, which is a reduction of the presumptive figure by 40% by reason of the court's conscientious evaluation of the combination of the reducing factors noted above.

There is no reason for adjustment to the lodestar since all relevant factors are subsumed in the *Kerr* analysis. The figure of $29,137.50 is a reasonable fee in this case and the same is ordered.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States
District Judge

DATED: 1-20-89

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 19, 1993

Mr. Stephen Yagman
Yagman & Yagman
723 Ocean Front Walk
Venice, CA 90291

Re: Robert Nichols, et al.
v. Michael Romberg, et ux.
No. 92-402

Dear Mr. Yagman:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Farrar v. Hobby, 506 U. S. ___ (1993).

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG, *Plaintiffs/Appellees-Cross-Appellants,* v. ROBERT NICHOLS; DENNIS LAZZARI; HUGH LLOYD; JOHNNY JURTADO; THOMAS LAING; DIANE HANNON; R.D. CAMPBELL, *Defendants/Appellants-Cross-Appellees.*	Nos. 90-56125 91-55012 D.C. No. CV-83-8448-RG ORDER

On Remand from the United States Supreme Court

Filed June 8, 1993

Before: J. Clifford Wallace, Chief Judge, David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

COUNSEL

Stephen Yagman, Yagman & Yagman, Venice, California, for the plaintiffs-appellants.

Keith A. Fink, Cotkin & Collins, Los Angeles, California, for the defendants-appellees.

ORDER

Pursuant to the order of the Supreme Court of the United States, we vacate the award of attorneys' fees and remand this case to the United States District Court for the Central District of California for reconsideration in light of *Farrar v. Hobby*, 113 S. Ct. 566 (1992).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Michael Romberg, et al., Plaintiffs, v. Robert Nichols, et al., Defendants.	CASE NO. CV 83-8448 RG ORDER

On remand from the Ninth Circuit, Plaintiffs Michael and Debra Romberg's Motion for An Award of Attorney's Fees, pursuant to 42 U.S.C. § 1988 was reconsidered by the Honorable Richard A. Gadbois, Jr., on Monday, July 26, 1993, at 10:00 a.m. Having considered the arguments of counsel, the Court makes the following findings of fact and rulings of law:

I. Background

On December 23, 1983, Plaintiffs Michael and Debra Romberg ("Plaintiffs") filed suit against various Los Angeles police officers ("Defendants") for violating their Fourth Amendment rights by failing to obtain a search warrant before entering and searching their home. The suit arose from an incident that occurred on May 23, 1982. On this date, the Defendant police officers responded to a call indicating a domestic disturbance in the Plaintiffs' apartment. The officers called for back-up units. They heard a loud pounding and a scream, whereupon they entered the apartment, fearing that Mrs. Romberg had

been injured. An officer saw what he identified as narcotics paraphernalia on the coffee table. After the officers determined that Mrs. Romberg was uninjured, they searched the apartment for further evidence of narcotics.

At trial, Plaintiffs' attorney stated that Plaintiffs were not asking for more than nominal damages. Rather than receive a monetary award, the Plaintiffs wanted the court to vindicate their rights. The jury returned a verdict for the Plaintiffs, awarding them $1 each in nominal damages. The district court granted the Plaintiffs' motion for attorney's fees, but lowered the amount of the fee award. The case was then appealed and cross-appealed on the issue of attorney's fees.

On May 14, 1991, the Ninth Circuit held that the jury verdict awarding Plaintiffs nominal damages of $1 each for the violation of their civil rights by the Los Angeles police officers did entitle the Plaintiffs, as "prevailing parties," to attorney's fees under 42 U.S.C. § 1988.

On January 19, 1993, the United States Supreme Court granted the petition for a writ of certiorari. The Supreme Court vacated the judgment and remanded the case to the U.S. Court of Appeals for the Ninth Circuit for further consideraiton in light of *Farrar v. Hobby,* 506 U.S. ___, 121 L. Ed. 2d 494 (1992).

On June 14, 1993, the Ninth Circuit vacated the award of attorney's fees and remanded the case to the U.S. District Court for reconsideration in light of *Farrar.*

II. Analysis

In *Farrar*, 121 L. Ed. 2d 494, the Supreme Court held that a civil rights plaintiff who receives a nominal damages award is a "prevailing party" under 42 U.S.C. § 1988, and is eligible to receive attorney's fees. 121 L. Ed. 2d at 503. However, if "a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief [citations omitted], the only reasonable fee is usually no fee at all." *Id.*, 121 L. Ed. 2d at 506.

In *Farrar*, the jury found that one of the defendants had violated the plaintiff's civil rights. Therefore, the Supreme Court found that the plaintiff, as the "prevailing party," was eligible for an award of attorney's fees. However, the plaintiff sought $17 million in damages and received $1, leading the Supreme Court to find that the appropriate award of attorney's fees was none at all. Here, the Plaintiffs did not even argue that they should receive more than $1 in nominal damages, making a stronger case for awarding no attorney's fees.

Pursuant to the Supreme Court's ruling in *Farrar v. Hobby*, the Court hereby finds that while the Plaintiffs are the prevailing party in this case, the appropriate award of attorney's fees is no fees at all.

IT IS SO ORDERED.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: August 16, 1993